SUPREME COURT, U. S.

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Supreme Court of the United States.

OCTOBER TERM, 1970.

No. 601

JOHN KERIAKOS, ACTING SHERIFF AND MASTER OF HOUSE OF CORRECTION AT BILLERICA, MASSACHUSETTS,
Petitioner,
v.
JOHN L. HUNT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF RESPONDENT HUNT IN OPPOSITION.

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BRIEF OF RESPONDENT HUNT IN OPPOSITION.

Questions Presented.

I. The court below did not err by deciding as a matter of law that the magazines in question were not obscene and thus were entitled to First Amendment protection.

II. The federal court has jurisdiction to review, on collateral attack in a habeas corpus proceeding, the simple issue of obscenity vel non.

Statement of the Case.

The petition for a writ of certiorari claims first (Point I) that the magazines in question are clearly obscene even

though recent decisions of this court, some with the same magazines at issue, have held them to be the proper subject of constitutional protection.

Petitioner further claims (Point II) that the court below erred in holding that the federal courts could determine for themselves the issue of obscenity vel non in a habeas corpus proceeding. Petitioner attempts to merge two concepts—that of the sufficiency of evidence and that of constitutional fact. This case involves the latter—interpretation of which has always been the special province of the federal courts.

Facts.

Respondent, Hunt, adopts petitioner's statement of the facts (commencing on page 2 of the petition) subject to the following modifications and comments which respondent feels are necessary for clarification of the issues presented.

Petitioner, at page 3 of his statement in relating the chronology of respondent's original direct appeal, states that certiorari in this court was denied against the claim that the magazines in question were not obscene. This implies that this court's denial of certiorari was in some way a substantive decision on the merits. This court has long maintained that a denial of certiorari cannot be so construed. *Daniels* v. *Allen*, 344 U.S. 443 (1953) (App. A. at 19, fn. 2)[1].

At page 3 of his statement, petitioner rightly notes that respondent appealed subsequent to an adverse decision in the district court. Respondent, however, had been incarcerated since January 16, 1970. On March 6, 1970, the

[1] References are to the Appendix filed by petitioner and attached to the present petition ("App.")

court below admitted respondent to bail pending the determination of his appeal by the First Circuit Court of Appeals of the district court's denial of habeas corpus. Thus, though subsequently exonerated by the court below, respondent served almost one half of the sentence imposed upon him.[2]

Petitioner states that the district court relied on the test set forth in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts*, 383 U.S. 413, 418, in concluding that the subject magazines were obscene. (Petitioner's statement at 9) This is correct. Moreover, the petitioner maintains the court below completely omitted from its deduction the premise concerning contemporary community standards (Petitioner's brief at 11). Though the district court concluded that the magazines in question affronted prevailing community standards, it neither heard evidence on what the boundaries of this supposed standard were nor did it in its opinion define its perception of this community norm. In the companion case on this petition, *McBrine* v. *Palladino*, in the district court, the judge noted that he interpreted the word "community" to mean the nation as a whole (App. C, at 26, fn. 1). It is respondent's belief that the court below also used as an operative absolute that "community" must be the national community if we are to have any semblance of comprehensibility in this area of our law (App. A, at 18 and 19).

As petitioner states at page 9 of his statement, this court decided the case *Bloss* v. *Dykema*, 39 U.S.L.W. 3473, 3477-3478 (June 1, 1970) just prior to oral argument in the court below. The court below did base its decision in part on *Bloss* and *Central Magazine Sales, Ltd.* v. *United States*, 389 U.S. 50 (App. A, at 18). Petitioner, however, em-

[2] Respondent was to serve a total of three months.

phasizes the use by the court below of the word "obliged" when announcing it would follow the *Bloss* and *Central Magazines* rationale. This misconstrues the obligation the court below felt and was expressing. Petitioner implies the court below felt constrained against its will to hold the magazines in question here to be constitutionally protected. There is no evidence of this in the court's opinion. The court below was stating by its use of the word "obliged" that it was fulfilling its function as an interpreter and enforcer of the precedent abstracted from the court's opinions. If the court felt constrained about anything, it felt obliged to follow this court's guidelines to the letter so as not to create any further local deviations in this overly confused area of our law (App. A, at 20).

Reply to Petitioner's Argument.

I. It is settled that the determination whether a publication is constitutionally protected is a question of law. *Jacobellis* v. *Ohio*, 378 U.S. 484 (1964). Thus, the simple question here is whether a publication containing nude photographs which focus on the pubic area of female nudes in various attitudes and positions, including legs widespread to reveal the genital area, are obscene as a matter of law.

The magazines herein are quite comparable to and in some instances are the exact magazines found not to be obscene by this court as well as by various federal and state Appellate Courts.[3]

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[3] Petitioner describes the magazines which were the subject of the complaints against respondent in the state court at pages 4 and 5 (B, "Cover Girl," vol. No. 9) and at pages 7 and 8 (E "Suzette") of his statement. The court below relied on the most recent affirmation by this court in *Bloss* v. *Dykema*, 39 U.S.L.W. 3473, that magazines of this exact type were simply not obscene (App. A, at 18).

The standard advocated by this court for the determination of obscenity appears to be limited to "hardcore" pornography which has been restricted to those materials depicting lewed sexual activity. *Redrup* v. *New York*, 386 U.S. 767 (1967). In *People* v. *Noroff*, 63 Cal. Rptr. 575, 577, 433 P. 2d 479, 481 (1967) the court observed (in footnote 6):

> "The graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene. The publications involved in *Ginzburg* v. *United States, supra,* 383 U.S. 463 . . . contained descriptions and photographic essays dealing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of '*animating* sensual detail to give the publication a salacious cast . . .' the film central to the litigation in *Landau* v. *Fording, supra,* 388 U.S. 456 . . . 'explicitly and vividly revealed act of masterbation, oral copulation . . . sadism, masochism and sex' . . . Such materials, and no others, have been thought to constitute 'hard-core pornography.' (See the dissenting opinion of Stewart, J., in *Ginzburg* v. *United States, supra* . . . see also Magrath, The Obscenity Cases: Grapes of Roth, The 1966 Supreme Court Review 7, at 71.)"

In *Central Magazine Sales, Ltd.* v. *United States*, 389 U.S. 50 (1967), this court, in a per curiam opinion, reversed the United States Court of Appeals for the Fourth Circuit. The publication was entitled "Exclusive" and was described by Chief Judge Haynsworth of the Fourth Circuit as follows:

> "*Exclusive* is a collection of photographs of young women. In most of them, long stockings and garter belts are employed to frame the pubic area and to focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the model's wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: The model, clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide." (373 F. 2d 633, 634.)

It is submitted that Chief Judge Haynesworth's description of the magazine "Exclusive" is also applicable to the magazines in the present case *except* the more egregious element of sadism is lacking in the present material.[4] The

[4] See also *Austin* v. *Kentucky*, 386 U.S. 767 (magazines entitled "Spree" No. 38 and "High Heels", vol. 2, No. 6); *Gent* v. *Arkansas*, 386 U.S. 767 (magazines entitled "Gent," "Swank," "Bachelor," "Act," "Calvalcade," "Gentleman" and "Sir"); *Rosenbloom* v. *Virginia*, 388 U.S. 450 ("solis" a magazine printed in German, and also 207 other nudist magazines); *Ratner* v. *California*, 388 U.S. 442 (motion picture film "Honey Bee"); *Cobert* v. *New York*, 388 U.S. 443 (motion picture films "Jane Palmer No. 2," "M Jordan" and "Jayne Tracy"); *Schackman* v. *California*, 388 U.S. 454 (girlie pictures in coin-operated peep shows); *Central Magazine Sales, Ltd.* v. *United States*, 88 S. Ct. 235 (Girlie magazine "Exclusive" and nudist magazines "International Nudist Sun," No. 16 and "Review International," No. 6); *Potomac News Co.* v. *United States*, 88 S. Ct. 233 (male nudist magazine "Hellenic Sun Number Two"); *Connor* v. *City of Hammond*, 88 S. Ct. 234 ("girlie" magazines); and *Chance* v. *California* 88 S. Ct. 253 (nude pictures).

court below so held (App. A, at 18). See also, *Grant* v. *United States*, 380 F. 2d 748 (C.A. 9th 1967); *Poulous* v. *Rucker*, 288 F. Supp. 305 (D.C. Ala. 1968).

In *Culbertson* v. *California*, 385 F. 2d 209 (C.A. 9th Cir. 1967), in a habeas corpus proceeding, a newspaper and magazine store proprietor was convicted by the Municipal Court of San Diego for the sale of obscene material. Like the magazine in the present case, the petitioner had sold a packet of twelve photographs, only one of which was visible to the prospective purchaser through a cellophane wrapper. The Court of Appeals for the Ninth Circuit, though finding the pictures not to its artistic liking, held them not to be the kind of "hard-core" pornography proscribed by *Redrup, supra, Jacobellis, supra,* and *Roth* v. *United States*, 354 U.S. 476.

The district court in the present case held that since this conviction resulted from a jury-waived trial in Massachusetts Superior Court, the state court judge, by the mere introduction of the magazine in question into evidence, could determine their obscenity. Petitioner does not dispute this contention. At petitioner's trial in Superior Court there was no evidence of sale to juveniles, or pandering by petitioner or of contemporary community standards which these magazines allegedly transgressed. The district court upon reexamination of these magazines anew, without additional evidence, held them obscene as a matter of law, relying on *Roth* v. *United States*, 354 U.S. 476 (1957) and *A book named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts*, 383 U.S. 413 (1966). Respondent maintains that in the absence of evidence of community standards, of sales to juveniles, of offers of sale in a manner so obtrusive as to compel an unwilling individual to expose to them or of pandering beyond the limits postulated in *Ginzburg* v. *United States*, 383 U.S. 463 (1966), these magazines were improperly held

obscene by the district court. The court below found none of these elements present (App. A at 19). Thus, under the rationale of *Redrup* v. *New York*, as the same has been historically applied (see footnote 4, *supra*, at 6), and the precedent of *Central Magazine Sales, Ltd*, and *Bloss*, the court below held the subject magazines here should be accorded the protection of the First and Fourteenth Amendments to the Constitution of the United States (App. A, at 18 and 19).

II. This case was tried by the Massachusetts Superior Court trial judge without a jury. From the trial transcript it is obvious that no evidence was introduced to establish pandering, prevalent community standards, prurient interest or the abuse of juveniles. The court below found these elements explicitly lacking in this case (App. A, at 19). Thus, with the mere introduction of the magazines in evidence, the state trial judge, by his implicit findings of fact and law, held them to be obscene. The district court, in its opinion denying the issuance of the writ of habeas corpus, held anew, from his own perusal of the magazines in question, that they were obscene as a matter of law (App. B, at 21 to 23). We submit that the court below could properly review the decision of a state trial judge as to matters of law and constitutional interpretation in a proceeding brought under the Federal Habeas Corpus Act (28 U.S.C. §§ 2241 *et seq.*).

The remedial effect of the great writ of habeas corpus has been expanded to meet the exigencies of contemporary life and knowledge. The Supreme Court has said:

> "Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy, its scope has grown to achieve its

grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963).

In *Culbertson* v. *California*, 385 F. 2d 209 (C.A. 9th Cir. 1967) and *Childs* v. *Oregon*, 300 F. Supp. 649 (D.C. D. Ore. 1969) both federal courts granted habeas corpus relief after making independant determinations as to the obscenity vel non of the material seeking First Amendment protection. Both defendants, in *Culbertson* and *Childs*, were state prisoners (Childs was given a five-year suspended sentence with probation) and both had exhausted their state court remedies, as has petitioner in the present case.

In *Childs* the court specifically took jurisdiction of the matter on the basis of 28 U.S.C. §§ 2241 *et seq.* and *Jones* v. *Cunningham*, 371 U.S. 236 (1963). In *Culbertson* the court implicitly assumed it had jurisdiction of the appeal and the issue. The alleged obscene material in *Culbertson* was a packet of photographs, in *Childs* it was a book.

In *Childs* the district court specifically stated that his opinion "shall constitute findings of fact and conclusions of law under Rule 52(a), Federal Rules of Civil Procedure." 300 F. Supp. 649, 651 (1969). In *Culbertson* the Court of Appeals for the Ninth Circuit examined photographs, apparently much like those in the present case, and concluded, as a matter of law based upon recent decisions of this court, that the writ should have been allowed by the federal district court.[5]

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[5] In *United States* v. *77 Cartons of Magazines*, 300 F. Supp. 851 (1969), the court said: "In applying these standards the trial judge must independently weigh the evidence in the light of the standards. What other judges may think about the material in the magazines in question is for other judges. This judge has reviewed all of the magazines submitted and, applying the *Roth*

It is not submitted that every allegation of deprivation of due process by a state prisoner should be cognizable in federal habeas corpus proceedings. The Fifth Circuit Court of Appeals has said:

> "It is not the function of this Court to search for an achilles' heel in every state criminal proceeding. Rather our aim is to relieve particular defendants who have suffered from constitutional deprivations." *Nees* v. *Culbertson*, 406 F. 2d 621, 626 (1969).

It is submitted that the guarantees of speech and press in the First Amendment, when threatened, are the type of constitutional deprivations to which the Court in *Nees* referred. The Massachusetts Constitution, Declaration of Rights, XVI, also guarantees the essential freedoms of speech and press to every individual in the Commonwealth. Obviously, the courts in *Culbertson* v. *California*[6] and *Childs* v. *Oregon*[7] considered the First Amendment and due

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standards, he finds them obscene." 300 F. Supp. 851, 855 (1969). Interestingly, in *United States* v. *392 Copies of a Magazine Entitled "Exclusive,"* 373 F. 2d 633 (1967), the Fourth Circuit Court of Appeals held similar magazines obscene and properly confiscated under 19 U.S.C. § 1305. This court in *Central Magazine Sales, Ltd.* v. *United States*, 389 U.S. 50 (1967), reversed the Fourth Circuit as to the obscenity vel non of the magazines. More importantly, the U.S. District Court for Central California recently enjoined the confiscation of similar photographs under 19 U.S.C. § 1305 using *Stanley* v. *Georgia*, 394 U.S. 557 (1969), as its rationale. *United States* v. *Thirty-Seven Photographs*, U.S. D.C. C. Calif. (three-judge court), 1/27/70, 6 Cr. L 2343.

[6] 385 F. 2d 209 (C.A. 9th Cir. 1967).

[7] 300 F. Supp. 649 (D.C. D. Ore. 1969).

process deprivations of such magnitude as to enable them to take cognizance of the issue of obscenity vel non. There is little debate over the importance of those rights guaranteed by the First Amendment as the fulcrum of our Bill of Rights. *Lovell* v. *Griffin,* 303 U.S. 444 (1938); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Commonwealth* v. *Gilfedder,* 321 Mass. 335 (1947). The court below did not have difficulty segregating the concepts of sufficiency of the evidence from constitutional interpretation. The petitioner would see these merged so as to preclude the federal courts from reviewing the obscenity vel non of the present magazines in a habeas corpus proceeding. The court below rightly held that due process deprivations which result from erroneous constitutional interpretation are always remediable in the federal courts. *Fay* v. *Noia,* 372 U.S. 391, 399-415 (App. A, at 19).

The rights of the First Amendment have long had special protection recognizable in habeas corpus proceedings.[8] In *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), a case of no small constitutional dimension with regard to freedom of the press, this court rendered its opinion after having denied certiorari on the original application for review from the Ohio Supreme Court, 352 U.S. 910 (1956). The petitioner then sought relief from his due process deprivations in the federal courts by habeas corpus.[9]

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[8] Another noteworthy area of due process protection in habeas corpus proceedings is that of involuntary confessions. See *Leyra* v. *Denno,* 347 U.S. 556 (1954).

[9] See also *Daniels* v. *Allen,* 344 U.S. 443 (1953), for a definitive statement by Justice Frankfurter on the issue of review by habeas corpus of constitutional fact and law.

The district court decided as a matter of law that the magazines in question were obscene. Respondent maintains that the district court did have the authority to render his opinion based on constitutional interpretation. Respondent, however, submits that the district court was incorrect as to the obscenity vel non of the publications in light of recent opinions of this court and the respondent was being held in custody in violation of the Fourteenth Amendment. Habeas corpus was the only available avenue of redress for respondent, under these circumstances, by which he could contest the soundness of those who had held the magazines to be beyond the ambit of First Amendment protection. As in all habeas corpus proceedings, the federal courts under 28 U.S.C. §§ 2241 *et seq.* do have jurisdiction to exercise their discretion and adjudicate the issue of obscenity vel non.

Conclusion.

For the above-stated reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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